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No. 86-334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ENSIGN ELECTRIC DIVISION OF HARVEY HUBBELL INCORPORATED *and* UNITED STEELWORKERS OF AMERICA, LOCAL 5929, AFL-CIO-CLC,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. THE RETROACTIVITY ISSUE

A. The Board asserts that the courts, by reason of § 10(e) of the Act, 29 U.S.C. § 160(e), lack jurisdiction to consider petitioners' challenge to the Board's retroactive application of *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983). The Board's contention is wholly without merit. It was rejected *sub-silentio* by the court below (which decided the retroactivity issue on its mer-

its), and, as the Board acknowledges (Br. Opp. 7-8, n.3), it has been rejected in every post-*Gulton* case in which the Board has raised it.

Section 10(e) provides, in pertinent part:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

In two separate ways, petitioners satisfied this requirement of § 10(e).

First, as the briefs to the Board in this case were filed two years before *Gulton* was decided, the parties perforce could not in those briefs have expressly opposed retroactive application of the not-yet-decided *Gulton*. But immediately upon issuance of the Board's decision in this case, petitioner Ensign notified the Board's Regional Director that it objected to the Board's retroactive application of *Gulton*, and that it would not comply with the Board's remedial order predicated on that retroactivity. Petitioner urged that the Board accordingly not pursue its quest for retroactive relief.[1] Four months later, the Board filed its application in the court below seeking enforcement of the retroactive order.[2] That the Board did not desist in the face of petitioner's objection

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[1] Petitioner Ensign's communications to the Board's Regional Director were filed with the court below in response to the Board's invocation of § 10(e). The Board's decision in this case was issued on January 25, 1984, and was received by the parties in the mail a few days thereafter. Petitioner first notified the Board's Regional Director of its objection in a phone call on February 10, 1984, and confirmed its position in a letter mailed that day. In response to efforts by the Board's agents to dissuade it from that position and to secure voluntarily compliance, petitioner reiterated its position by phone call and letter on March 5, 1984.

[2] The Board's application for enforcement was filed in the Court of Appeals for the Fourth Circuit on June 25, 1984.

is hardly surprising, for the Board had already decided that it would defend retroactive application of *Gulton* in the appellate courts, and indeed had already prevailed on the propriety of such retroactive application in *Local 900, Intern. U. of Elec. v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984).[3]

By notifying the Board's Regional Director of its objection in this manner, petitioner complied with both the letter and the spirit of § 10(e). The objection was lodged with an "agent" of the Board (§ 10(e)) promptly after the issuance of the decision that provided the first occasion for assertion of the objection,[4] and by reason of that objection the Board was put on notice of the grounds that would be advanced in the appellate courts were it to seek enforcement of its order without adjustment. *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255-56 (1943); *May Stores Co. v. NLRB*, 326 U.S. 346, 386-87, n.5 (1946); *Local 900, supra*, 727 F.2d at 1191-92.

Second, even had petitioner Ensign not *expressly* objected to retroactive application of *Gulton* following issuance of the decision below, the briefs that petitioners had filed with the Board *initially* were sufficient to put the Board on notice that petitioners objected to the retroactive application of any new rule the Board might formulate. Those briefs, which defended the decision of the Administrative Law Judge, noted that the super-seniority

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[3] *Local 900* was decided on February 10, 1984, coincidentally the same day that petitioner advised the Board of its objection to retroactive application of *Gulton*, see n.1, *supra*.

[4] As petitioners had prevailed before the Administrative Law Judge, and the briefs on review of the Administrative Law Judge's decision were due and filed years before *Gulton* was decided, there was no opportunity for petitioner expressly to object to retroactive application of *Gulton* until issuance of the decision below. See, *NLRB v. Wayne Transp., a Div. of Wayne Corp.*, 776 F.2d 745, 749 (6th Cir. 1985). The Board implicitly concedes this, contending only that post-decision objection was required (Br. Opp. 7). As explained in text, such objection was promptly made.

clause in the instant case conformed to the rule set forth in the decisions of the Board on the books at the time the clause was negotiated and implemented, and urged the Board to reject the General Counsel's exceptions seeking the application of a new rule to petitioners' conduct. Although petitioners' briefs did not speak expressly in terms of non-retroactivity, they were sufficient to apprise the Board that petitioners objected to the formulation of a new rule that would be applied to this case, given petitioners' reliance on the old rule. Two courts of appeals, in cases where (unlike here) there was no post-decisional objection to retroactive application of *Gulton*, found such an objection adequately manifested by the initial filing of briefs making the same points as the briefs in this case. *Local 900*, *supra*, 727 F.2d at 1190-94; *Wayne Transp.*, *supra*, 776 F.2d at 748-50.[5]

2. The Board also contends that the retroactivity claim advanced here was not made in the court of appeals. In so contending, the Board mischaracterizes the claim that petitioners make here. Thus, the Board asserts: "[T]he petition for certiorari raises for the first time in this case the claim that a discretionary construction of the Act may *never* be applied retroactively. . . . [P]etitioners did not argue below that retroactive application of the *Gulton* rule was *per se* improper because the *Gulton* rule reflects an exercise of discretionary authority by the Board" (Br. Opp. 8, emphasis added). But it is not petitioners' contention that "a discretionary construction of the Act may *never* be applied retroactively"; rather, it is petitioners' contention that a discretionary construction of the Act may not be applied retroactively to actions that were taken at a time when contemporaneous Board decisions—themselves permissible discretionary constructions of the Act—declared such actions to be lawful.

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[5] The Board, at Br. Opp. 7-8, n.5, inaccurately characterizes these decisions as holding that objection was not necessary. As a reading of these decisions will confirm, the courts held, rather, that objection was adequately made.

In the court below, petitioners argued: (1) that the pre-*Gulton* decisions of the Board represented a permissible construction of the Act; (2) that the actions of petitioners condemned here by the Board conformed to those then-controlling decisions; and (3) that no statutory interest would be served by applying the new construction retroactively. Petitioners expressly distinguished this case from those in which agencies have promulgated discretionary constructions as a matter of first impression. Thus, all of the components of the claim advanced here were advanced in the court below.

To be sure, petitioners urged these considerations below in the context of this particular case—contending that as these elements were present the Board could not permissibly apply *Gulton* retroactively to this case. Petitioners did not state below, as they do here in the petition, that the contention they made in the context of this case constitutes a rule of universal applicability in administrative law. But that shift in emphasis does not represent a shift in the nature of the claim. It is the office of a petition for certiorari to demonstrate that an issue arising in a particular case is of sufficient general importance to warrant this Court's plenary consideration. That the petitioner made the same contentions below but without focusing on their broader implications for the state of the law generally does not mean that to highlight the latter in a petition for certiorari alters the nature of the claim.

II. THE TIMELINESS ISSUE

The Board implicitly acknowledges that the decision below on the issue of timeliness under § 10(b) of the Act, 29 U.S.C. § 160(b), would be in conflict with *NLRB v. Auto Warehouses, Inc.*, 571 F.2d 860 (1978), but for the supposed fact that the superseniority clause here was "unlawful on its face" (Br. Opp. 13 & n.6). The Brief in Opposition insists that the clause *is* "unlawful on its face," because it grants superseniority to union officers

as such and does not declare on its face that the entitlement of those officers to superseniority depends upon their performing steward functions (*id.*). But the Board's *decision* in this case clearly refutes this proposition. The clause here conferred superseniority upon several union officers by title, without specifying that entitlement to superseniority depended upon the performance of steward functions. Yet the Board treated the clause as *lawful* with respect to the president and vice-president because *in fact* they performed steward functions (App. 31a). And the Board determined the clause to be unlawful "*as applied* to the recording secretary and treasurer" (*id.* 19a; emphasis added) only because the record evidence established that they "are not involved in grievance processing or other on-the-job contract administration or steward-like duties" (*id.*). Thus, the Board unquestionably treated the lawfulness of the clause as dependent upon the evidence of actual job duties, and did not regard the clause as unlawful on its face. Those who represent the Board in this Court are not free to alter a position taken in the underlying Board decision.

Respectfully submitted,

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